

**Before the  
NATIONAL TELECOMMUNICATIONS &  
INFORMATION ADMINISTRATION  
Washington, D.C.**

In the Matter of )

Broadband Technologies )  
Opportunities Program )  
\_\_\_\_\_ )

**Docket 090309298-9299-01**



**COMMENTS OF  
THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL (ALEC)**

In establishing the broadband grant program authorized by the *American Recovery and Reinvestment Act of 2009*, the National Telecommunications & Information Administration (NTIA) should respect the role of the private marketplace in providing broadband by avoiding any unfair favoritism of municipal network operators over private network operators. NTIA should appropriately fund broadband mapping efforts in the states that avoid unnecessary or duplicative data collection burdens. And NTIA should *not* impose new regulation over broadband through non-discrimination and interconnection obligations, but should instead adopt the Federal Communications Commission's *2005 Broadband Policy Statement* as the sole definition of those obligations.

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## STATEMENT OF INTEREST

The American Legislative Exchange Council (ALEC) is the nation's largest nonpartisan, individual membership organization of state legislators. ALEC's mission is to promote Jeffersonian principles of limited government, federalism, free markets, and individual liberty. ALEC establishes public policies for modern communications and broadband through its Telecommunications and Information Technology Task Force.

Official ALEC policies concerning modern technologies seek to preserve free-market principles, promote competitive federalism, uphold deregulation efforts, and keep the advanced technologies free from new burdensome regulations. For instance, ALEC's *Resolution Regarding the Regulation of Intrastate Telecommunications Services in Healthy and Sustainable Competitive Environments*, declares that "full and open competition, not multiple layers of regulation, should drive healthy and sustainable competitive marketplaces." The *Resolution* voices ALEC's support of "minimal, competitively neutral state and federal regulation of all telecommunications providers, including incumbent and competitive wireline carriers, wireless carriers and cable telephony providers," and its further support of "the current minimally regulated status of the Internet and Internet-based services."

In addition, ALEC's *Resolution Supporting Pro Consumer Public Policy for Voice, Video, and Data Services* articulates that "all public policy must be driven by free market principles for the benefit of consumers in this Nation and its states," that "a competitive marketplace, not multiple layers of regulation, will most efficiently provide consumers with voice, video and data choice in the marketplace today," and that "Government policies should encourage the private sector to provide competitive choices."

The analysis ALEC provides in these comments reflects both these general policies and other, more specific policies addressing particular issues discussed below.

## **ANALYSIS**

Through the *American Recovery and Reinvestment Act of 2009*, Congress directed the National Telecommunications & Information Administration (NTIA) to establish the "Broadband Technology Opportunities Program" (BTOP). ALEC directs these comments primarily to NTIA. However, to the extent that the analysis provided below relates to the Rural Utility Service's (RUS) implementation of its own grants and loan program or to NTIA's coordination with RUS, ALEC intends for RUS to take these comments into consideration.

### ***The Role of the States***

As a member organization of state legislators, ALEC has a sharp institutional interest in what role the states play or should play with respect to various aspects of the BTOP. At this time, however ALEC does not offer specific comments on the consultative role of the states with regard to NTIA.

ALEC will be deliberating on key aspects of the *Recovery Act*—including BTOP—at its upcoming meetings. Accordingly, ALEC may provide subsequent *ex parte* or communications outside the official record to the NTIA concerning the role of the states in the implementation of BTOP, to the extent permissible under federal laws and regulations.

### ***Establishing Selection Criteria for Grant Awards***

As an organization dedicated to principles of limited government, competitive federalism and free markets, ALEC believes that the private sector should be encouraged to provide competing choices to consumers. Although ALEC believes that the private sector is the ideal provider of broadband and other competing technologies choices for consumers, it recognizes that the *Recovery Act* can be fairly read to include municipal broadband network operators as eligible recipients of BTOP grants.

Concerning municipalities' ownership and operation of advanced telecommunication, cable and broadband services, ALEC's official policy is contained in its *Municipal Telecommunications Private Industry Safeguards Act*. ALEC believes it essential that "when a municipality ... competes with private providers whose activities are regulated by the municipality, the municipality does not discriminate against the competing providers of the same services." It is ALEC's view that "[w]hen municipalities do provide such services that safeguards be established "to ensure that private providers with whom the municipality competes are not disadvantaged by the municipality in the exercise of its bonding and taxing authority, management of rights of way, assessment of fees or taxes, or in any other way."

ALEC believes it imperative that the awarding of BTOP grants does *not* in any way discriminate in favor of municipal broadband networks or discriminate against private sector broadband network operators. It is ALEC's strongly considered view that NTIA should reject calls for giving municipal broadband networks exclusive or otherwise unfair and discriminatory preference over private sector providers of broadband. In establishing criteria for BTOP grants, NTIA should treat competing private broadband network operators at least as favorably as municipal broadband network providers.

## ***Broadband Mapping***

One of the most significant aspects of the *Recovery Act* is its directing of NTIA to establish a nationwide inventory map of the geographic extent of broadband deployment and availability by commercial or public providers throughout each State. The *Recovery Act* appropriates federal funding for state-created entities for broadband mapping first contemplated by the *Broadband Data Improvement Act*.

In times past, ALEC has considered and adopted model legislation calling for states to create joint committees of state officials and private-partners that may accept both public and private money to develop broadband plans for their respective states' future. Accordingly, ALEC's policy in this respect is guided by its model *Concurrent Resolution Creating a Special Joint Committee to Develop a Comprehensive Telecommunications Plan for the State and to Make Recommendations Thereon to the Legislature*. ALEC's policy embodies an evolutionary approach to broadband technology deployment that is designed from the bottom up, with the private sector providing competing choices to the benefit of consumers. ALEC understands that increased knowledge of the diverse needs of the states and their citizens and the reach of existing facilities and systems can better encourage and enable the private sector to meet those needs.

ALEC believes that the broadband mapping provisions of the *Recovery Act* and its implementation by NTIA are important and worthwhile. Notably, the FCC recently initiated new broadband data collection mechanisms that could be extremely useful to the mapping efforts and reduce the information collection burdens on broadband providers. (See 23 FCC Rcd 9691 (2008); 23 FCC Rcd 9800 (2008)). NTIA should encourage states and the FCC to work together to utilize this data, but to do so in a manner that protects its underlying confidentiality. To that end, where states decide to undertake their own mapping efforts, NTIA should be aggressive in allocating money to public-private partnerships created by the states for broadband mapping of their geographic region. If competing broadband providers are better able to ascertain the broadband service capabilities and availabilities of the geographic bounds of the states, they will be better positioned to undertake the investment to expand their broadband infrastructure and service operations. It stands to reason that better decisions regarding broadband deployment will be realized with the knowledge obtained from the FCC's data collection as well as statewide broadband mapping projects.



### ***Financial Contributions by Grant Applicants***

To the extent that NTIA's consideration of financial contributions and "financial need" by grant recipients involves a determination of criteria and rankings of eligibility similar to the one NTIA undertakes for overall grant eligibility, ALEC reiterates its views articulated above. Namely: NTIA should not in any way discriminate in favor of municipal broadband networks or discriminate against private sector broadband network operators. Rather, NTIA should reject giving municipal broadband networks exclusive or otherwise unfair and discriminatory preference over private sector providers of broadband through its establishment of factors defining "financial need." Consistent with ALEC's general preference that the competitive marketplace be the mechanism for delivering broadband services to consumers, ALEC provides a note of caution against readily awarding grants to entities in excess of an 80% share. Where public or private sector entities are lacking a demonstrable track record of deploying and providing broadband, significant broadband grant investment in such entities risks significant waste of federal funding.

## ***Definitions***

ALEC recommends that NTIA adopt the definitions and understandings set out below in establishing and administering BTOP:

- **Definition of “broadband”**

The Federal Communication Commission’s (FCC) existing definition of the term “broadband” is sufficient for carrying out the duties assigned by the *Recovery Act*. It is therefore unnecessary to adopt a new definition. The term “broadband” is currently defined by the FCC as:

advanced communications systems capable of providing high-speed transmission of services such as data, voice, and video over the Internet and other networks. Transmission is provided by a wide range of technologies, including digital subscriber line and fiber optic cable, coaxial cable, wireless technology, and satellite.

(See [www.fcc.gov/broadband](http://www.fcc.gov/broadband).)

- **Non-discrimination and interconnection obligations that will be contractual conditions of BTOP grants**

ALEC believes that the principles contained in the FCC’s 2005 *Broadband Policy Statement* should serve as the non-discrimination and interconnection obligations for BTOP grants. According to the *Policy Statement*, “[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet”:

consumers are entitled to access the lawful Internet content of their choice...

consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement...

consumers are entitled to connect their choice of legal devices that do not harm the network...

consumers are entitled to competition among network providers, application and service providers, and content providers.

20 FCCR 14986 (2005). By its terms, the *Recovery Act* provides that the *Policy Statement*—which applies only to *wireline* broadband—shall serve as the floor for conditions attached to BTOP grants. *See* § 6001(j).

ALEC's *Resolution on Network Neutrality* adopts the terms of FCC's principles for broadband access to the Internet over wireline facilities, recognizing that consumers are entitled to access the lawful Internet content of their choice, receive meaningful information regarding their broadband service plan, run applications of their choice, and benefit from marketplace competition. ALEC believes it important that those principles should be understood in light of "limits on bandwidth and quality of service of their service plans," and the imperative that consumers must not "harm the provider's network or interfere with other consumers' use of the broadband service." More generally, ALEC's *Resolution* recognizes that "companies that invest in broadband and broadband-related applications should be

afforded the flexibility to explore fair and competitive business models and pricing plans for their products and services.” The *Resolution* also declares that “mandated net neutrality regulations would impede future capital investments in the U.S. broadband infrastructure.”

There are important reasons why NTIA should exercise its discretion to reaffirm the principles in its *Policy Statement* and thereby adopt a minimalist approach for non-discrimination and network interconnection obligations. The deployment of broadband and flourishing of broadband service offerings to consumers has taken place under a governmental “hands off” approach. Imposing a new regulatory and never-before-seen regime over broadband through contractual conditions for receiving BTOP grants, however, threatens to interfere with an economic environment that thrives on flexibility and innovation. Experimentation with different technologies and business models is key to encouraging private investment in broadband infrastructure and spurring competition. But regulatory uncertainty posed by new regulations will not spur increased private investment in broadband. New regulations would thwart the investment-backed expectations of broadband service providers who have made significant investments in broadband networks in reliance upon a light-touch regulatory regime.

Given the problems posed by imposing a set of grant conditions that will infringe upon broadband service providers' ability to engage in reasonable network management, conditioning BTOP grants on the FCC's *Policy Statement* best serves the primary purpose of the *Recovery Act*: spur investment and economic growth. NTIA should define BTOP obligations in keeping with the *Recovery Act*'s purpose of fostering economic expansion. Extraneous purposes and regulatory policy agendas should be kept separate from the administration of the BTOP. Those policy debates can be more fully explored in the future. But unrelated ends should not distract from the more immediate goal of economic recovery in setting the terms of BTOP operations. Economic investment and expansion will best be achieved by establishing the FCC's *Policy Statement* as the entirety of non-discrimination obligations for receiving BTOP grants.

ALEC believes that network interconnection obligations should be defined as those existing, minimal, direct or indirect interconnection regulations and practices for telecommunications providers who also provide information services. Accordingly, network interconnection obligations should be understood in light of the FCC's *Policy Statement* discussed above. In order to best preserve the "hands off" approach to broadband and the Internet and to further the *Recovery Act*'s purpose of spurring investment and

rapid economic growth, NTIA should *not* define network interconnection obligations to include any new regulations.

In establishing the principles contained in the *Policy Statement* as the non-discrimination and network interconnection obligations for BTOP grants, it is important that those principles be faithfully adhered to. NTIA should understand the *Policy Statement* on its own terms, without addition or subtraction. The principles contained in the *Policy Statement* are carefully limited in scope so as to ensure a free and open Internet. For BTOP purposes, the *Policy Statement* should *not* be re-interpreted to somehow impose a broader set of regulations for broadband technologies.

## **CONCLUSION**

In establishing the broadband grant program authorized by the *Recovery Act*, NTIA should respect the role of the private marketplace in providing broadband by avoiding any unfair favoritism of municipal network operators over private network operators. NTIA should appropriately fund important broadband mapping in the states in a manner that compliments pre-existing state mapping projects and avoids imposing extra, unnecessary burdens due to duplicative FCC mapping efforts. Finally, the NTIA should *not* impose new regulation over broadband through non-discrimination and interconnection obligations, but should instead adopt the FCC's 2005 *Broadband Policy Statement* as the sole definition of those obligations.

Respectfully submitted,

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